

## This year's H-1B lottery: The Trump legacy of chaos must end

### Synopsis

For this year (FY 2021-22), the USCIS has attempted to change the lottery selection process to favor the highest paid employees first. That change is embodied in a proposed regulation, which can be published as a final rule any time.



The H-1B filing season is upon us, expected to begin on March 1, 2021. The US employers are concerned -- will the USCIS change the lottery system? I doubt that they can.

Every year, the US Immigration and Naturalization Service (USCIS) receives far more applications than the H-1B quota permits. Because of this overage, the applications are put through a lottery system of random selection. The applications are filed in the first quarter of the calendar year with a start date of October 1st for those that are selected and approved.

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For this year (FY 2021-22), the USCIS has attempted to change the lottery selection process to favor the highest paid employees first. That change is embodied in a proposed regulation, which can be published as a final rule any time. We expect and hope that regulation will not survive force of laws, the facts, and the Democrat's resurgent power in the Presidency and Congress (the US Parliament).

### The Proposed Regulation - Hire only the Highest Paid Workers

The current lottery system allows hiring at various wage levels: Level 1, beginner, just out of school; Level 2, competent; and Levels 3-4, senior workers.

The proposed regulation would process the highest paid workers applications first. The regulation claims that "Prioritizing wage levels in the registration selection process incentivizes employers to offer higher wages...[and]...it disincentivizes abuse of the H-1B program to fill lower-paid, lower-skilled positions, which is a significant problem under the present selection system."

This change would effectively destroy the H-1B system.

### **The Law and the Facts Militate Against the Proposed Changes**

Based upon Trump's Executive Orders, USCIS has throughout the Trump administration turbocharged its assault on legal immigration; its plainly illegal efforts to overturn the laws. This specific effort, however, is clearly neither permitted by the laws, nor by the facts.

This proposed drastic policy shift will almost certainly be found untenable by courts, who have in various contexts held that the Trump administration cannot usurp the law-making power of Congress. In formulating laws, Congress carefully balances various priorities, as here, the need for the US businesses, schools, universities and healthcare entities to recruit and retain talent against the need to protect qualified US workers.

The practice of hiring skilled and professional workers has existed in our laws for 65 years, 50 of which allowed hiring at all skill levels. The attempted rewriting of a statute by the USCIS, its lack of study, failure to give adequate notice, and the facts -- all compel the proposed change to fail.

In addressing the USCIS misadventure, one of the commentators, a group of 18 highly respected associations noted that "...the proposal does not allow well-compensated but early-career professionals that happen to be foreign-born to be hired by compliant U.S. employers paying competitive wages, including international students recently completing undergraduate, graduate, or professional degrees from American colleges and universities." Also that "in the real-world U.S. labor market for professionals, employers value professionals at all skill levels."

This change is untenable under the law and the facts.

### **The Regulation is Bound to Fail - The H-1B Lottery Selection Should Remain Unchanged**

This regulation should not be finalized, even though its regulatory process is complete. Mr. Biden will get sworn in to his office as President on January 20, 2021. We can reasonably expect that the USCIS will not, this close to a change over, regulatorily impose old Trump policies on a new administration.

Mr. Trump's immigration "policies" were made based upon slogans and chants and implemented without notice. Mr. Biden's, on the other hand, are likely to be far better considered and efficiently implemented. He has already shown a record of hiring well qualified experts for the administration tasks.

If the USCIS does implement the regulations, both the Congress and the Courts are likely to effect reversal. The Congress can reverse any regulation within sixty days of passage through a joint resolution of the two chambers of the Congress.

Note that the democrats now have (a slim) majority in both the chambers, so, such a resolution should be relatively easy to secure. The regulation is also wide open to legal challenge in courts because it far exceeds the statutory scheme conceived by the Congress in the US Immigration and Nationality Act. A regulation cannot trump (no pun) a statute.

*The author is Managing Attorney at Immigration.Com*

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